IN THE

Supreme Court of the United States

October Term—1943.

No. 268

THE 18TH STREET LEADER STORES, INC.,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support of Petition.

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THE 18TH STREET LEADER STORES, INC., *Petitioner*, vs. THE UNITED STATES OF AMERICA, *Respondent*.	No. ....

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit and Brief in Support of Petition.

To the Honorable Harlan F. Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

Summary Statement of Matter Involved.

A judgment dismissing petitioner's complaint was entered by the District Court of the United States for the Northern District of Illinois, Eastern Division on January 4, 1943 (R. p. 37). Said judgment was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit on May 3, 1944 (R. p. 51). Petitioner prays that a writ of certiorari issue to review said judgment.

On December 9, 1936, petitioner filed with the office of the Collector of Internal Revenue, First District of Illinois, a claim for the refund of $2,218.32 paid as floor stocks taxes under the provisions of the Agricultural Adjustment Act of 1933 (R. pp. 7-13). On May 17, 1938, petitioner was notified that its claim for refund had been rejected and that the Commissioner of Internal Revenue was without authority to consider the claim on the ground that petitioner had not submitted evidence sufficient to establish that the petitioner had borne the burden of the taxes, refund of which was claimed (R. pp. 23-24).

Petitioner filed a new claim for refund of the same amount on December 31, 1939 (R. pp. 25-31) with four affidavits attached (R. pp. 32-35). On June 21, 1940 plaintiff was notified that this claim for refund had been rejected on the ground that said claim for refund was a duplicate of a prior claim filed December 9, 1936 and rejected May 17, 1938, and that Article 302 of Regulations 96 provides that only one claim shall be filed for refund of floor stocks taxes; that action on the claim of December 9, 1936 had become final, since the statute of limitations for filing suit prescribed in Section 904 (two years from mailing of the notice of disallowance), had expired; and that any refund is now barred by Section 3774 of the Internal Revenue Code (48 Stat. 756) (R. p. 36).

On June 20, 1942, petitioner instituted suit in the United States District Court for the refund of the floor stocks taxes paid as aforesaid (R. pp. 2-3). The respondent moved to dismiss the complaint on the ground that the Court was without jurisdiction to hear and determine upon the merits of the matters alleged in the complaint for the reasons that (1) contrary to the provisions of Sections 902 and 903 of the Revenue Act of 1936 (49 Stat. 1648), and Regulations 96, plaintiff did

not file a proper claim for refund and did not submit evidence to the Commissioner of Internal Revenue to prove that it bore the burden of the taxes and (2) contrary to the provisions of Section 904 of the Revenue Act of 1936 and Regulations 96, the complaint was filed more than two years after the date of mailing of the notice of disallowance of the claim for refund of the taxes sought to be recovered in this action.

The District Court granted the motion to dismiss, without opinion (R. p. 37). The Circuit Court affirmed the judgment of the District Court (R. p. 51).

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question under the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240, Title 28 U. S. C. A., Section 347, and under Rule 38, sub-division (5) of the Rules of the Supreme Court.

Questions Presented.

1. Was the action barred by Section 904 of the Revenue Act of 1936 (49 Stat. 1648) and Regulations 96; is refund barred by Section 3774 of the Internal Revenue Code (48 Stat. 756)?

2. Does petitioner's claim for refund comply with Sections 902 and 903 of the Revenue Act of 1936 (49 Stat. 1648), and Regulations 96; does the District Court have jurisdiction of the action?

Reasons Relied on for Allowance of Writ.

1. The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is in direct

conflict with the decision of the Circuit Court of Appeals for the First Circuit, in the case of *Pacific Mills* v. *Nichols*, 72 F. (2d) 103 (C. C. A. 1st, 1934). The latter case also dealt with the question as to whether a taxpayer after rejection of his claim for refund, without any consideration thereof by the Commissioner of Internal Revenue, may wholly abandon said claim and file a new claim so long as the statute of limitations had not run on the filing of claims.

The instant decision is also in conflict with the following decisions of the United States Court of Claims and the United States District Courts in the Second, Third and Sixth Circuits involving the same issues:

First Nat. Pictures v. *U. S.*, 32 Fed. Supp. 138 (Court of Claims 1940);

Detroit Trust Co. v. *U. S.*, 18 Fed. Supp. 776 (Court of Claims 1937);

Williams v. *U. S.*, 48 Fed. Supp. 647 (Court of Claims, 1943, cert. den. Oct. 11, 1943);

Sun-Herald Corporation v. *Duggan*, 15 Fed. Supp. 415 (S. D. N. Y. 1936);

Dinon v. *U. S.*, 37-1 U. S. T. C. 9149 (E. D. Pa. 1936);

Stephenson v. *Woodworth*, 39-1 U. S. T. C. 9469 (E. D. Mich. 1929).

The instant decision is also in conflict with *L. O. 1116 of the Solicitor of Internal Revenue*, C. B. III p. 350 (1924).

2. The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Bethlehem Baking*

Co. v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1942). The latter case also involved a claim for refund under Title VII of the Revenue Act of 1936 of taxes paid under the Agricultural Adjustment Act of 1933 (48 Stat. 31) and dealt with the question as to whether a claim for refund submitted to the Commissioner must be substantiated by evidence.

The instant decision is also in conflict with the following decisions of United States District Courts in the Third, Fourth, Fifth and Ninth Circuits:

Hutzler Bros. v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940);

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1941);

Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);

Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D. Texas 1940);

Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 742 (E. D. Pa. 1942).

The decision of the Circuit Court of Appeals for the Seventh Circuit in the within matter is likewise in direct conflict with the following decisions of the Circuit Court of Appeals for the Fifth and Sixth Circuits:

Snead, Collector v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1938) (26 U. S. C. A. 156; Reg. 45, Art. 1036);

Paul Jones & Co. v. *Lucas*, 33 F. (2d) 907 (D. C. Ky. 1929) Affirmed 64 F. (2d) 1016 (C. C. A. 6th, 1933).

These cases involved claims for refund under other but similar statutes on the question as to whether a claim

for refund submitted to the Commissioner must be substantiated by evidence. The authority for analogy to the latter is found in the Congressional Committee Report on the Revenue Act of 1936 (C. B. 1939-1, Part 2, pp. 699-700).

The instant decision is also in conflict with the following decision of the United States District Court in the Sixth Circuit involving the same issue:

> *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. (2d) 146 (D. C. Ky., 1925).

3. The Circuit Court of Appeals for the Seventh Circuit has decided an important and substantial question of federal law which has not been and should be settled by the Supreme Court.

Respondent had moved to dismiss the complaint on the ground, in part, that the District Court "is without jurisdiction to hear and determine upon the merits of the matters alleged in the complaint * * *" (R. p. 4) for the reason that no evidence had been submitted to the Commissioner of Internal Revenue. The Circuit Court, without ruling specifically on the question of jurisdiction, has ruled, in effect, by its affirmance of the dismissal of the complaint, that the District Court has no jurisdiction of the action. This question of jurisdiction of the District Court, it is submitted, is of utmost importance and should be settled by the Supreme Court.

Further there are many hundreds of cases such as the instant one still pending in the Federal District Courts. Recovery will be denied claimant in some circuits for the same reason that recovery was here denied, whereas, other claimants in similar factual situations, but in different circuits, will recover. If certiorari is here granted and the ultimate guiding rule in this type of case is an-

nounced by the Supreme Court, there will be uniformity of decision in the several circuits; thus, there will be no advantage afforded to some claimants solely by reason of their geographical location; further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the courts, counsel and litigants.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 8344, *The 18th Street Leader Stores, Inc., Appellant* v. *The United States of America, Appellee,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court, and for such further relief as to this Court may seem proper.

DAVID J. SHORB,
Counsel for Petitioner.

Dated: July 10, 1944.

BRIEF IN SUPPORT OF PETITION.

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. p. 51) was rendered on May 3, 1944; 44 U. S. Tax Cases 9310. No opinion was rendered by the District Court for the Northern District of Illinois, Eastern Division. Judgment was rendered by said District Court (R. p. 37) on January 4, 1943.

Jurisdiction.

1. The date of the judgment to be reviewed is May 3, 1944; the petition for writ of certiorari is being presented before August 3, 1944.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the Act of February 13, 1925 (C. 229; 43 Stat. 938) amending the Judicial Code, Section 240; Title 28 U. S. C. A., Section 347, and Rule 38 Sub-division (5) of the Rules of the Supreme Court.

3. The nature of the within case and the rulings of the Circuit Court are such as to bring the case within said jurisdictional provisions.

The case involves an important question of federal law which has not been and should be settled by the Supreme Court. The action was brought for refund of floor stocks taxes paid under the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) (R. pp. 2-3). A claim for refund of said taxes, which had been filed with the Commissioner of Internal Revenue under Title VII of the Revenue Act of 1936 (49 Stat. 1648) and Regulations 96 (R. pp. 7-13) was rejected by him on the

ground that he was without authority to consider the claim because petitioner had not submitted evidence in support of the claim for refund (R. pp. 23-24). A new claim for refund filed by petitioner (R. pp. 25-31) was rejected by the Commissioner on the ground that the same was a duplicate of the prior claim. The Circuit Court affirmed the judgment of the District Court dismissing the petitioner's complaint and ruled that there was no error in said dismissal, holding that the second claim was not a different claim as to constitute new grounds for the claim and thus start the running of the statute anew from the date of the disallowance thereof and that both claims for refund were insufficient (R. pp. 51-55).

Said rulings of the Circuit Court are in direct conflict with the decisions of the First Circuit and the Court of Claims on the issue as to whether the second claim was a new claim. Said decisions are listed in Paragraph 4 (A) *infra.*

Said rulings of the Circuit Court are in direct conflict with a decision of the Circuit Court of Appeals for the Third Circuit and with decisions of the Federal Courts in the Third, Fourth, Fifth, Sixth and Ninth Circuits on the question of sufficiency of the claim for refund and the necessity of the submission of evidence to the Commissioner. Said decisions are listed in Paragraph 4 (B) *infra.*

4. The cases believed to sustain said jurisdiction are as follows:

Pacific Mills v. *Nichols,* 72 F. (2d) 103 (C. C. A. 1st, 1934);

First Nat. Pictures v. *U. S.,* 32 Fed. Supp. 138 (Court of Claims 1940);

Detroit Trust Co. v. *U. S.,* 18 Fed. Supp. 776 (Court of Claims 1937);

Williams v. *U. S.*, 48 Fed. Supp. 647 (Court of Claims, 1943, cert. den. 10/11/43);

Sun-Herald Corporation v. *Duggan*, 15 Fed. Supp. 415 (S. D. N. Y. 1936);

Dinon v. *U. S.*, 37-1 U. S. T. C. 9149 (E. D. Pa. 1936);

Stephenson v. *Woodworth*, 39-1 U. S. T. C. 9469 (E. D. Mich. 1929);

Bethlehem Baking Co. v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1942);

Hutzler Bros. v. *U. S.*, 33 Fed. Supp. 801 (D. C. Md. 1940);

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D. Calif. 1941);

Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D. Va. 1940);

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Snead, Collector v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1943);

Fidelity & Columbia Trust Co. v. *Lucas*, 7 F. (2d) 146 (D. C. Ky. 1925);

Paul Jones & Co. v. *Lucas*, 33 F. (2d) 907 (D. C. Ky. 1929) Affirmed 64 F. (2d) 1016 (C. C. A. 6th, 1933).

5. The questions here involved are substantial for the reason that many hundreds of cases for the refund of taxes paid under the Agricultural Adjustment Act of 1933, involving millions of dollars, are now pending in the Federal Courts. The questions as to the effect of the abandonment of a claim for refund and the filing of a new claim before the statute of limitations for the filing

of claims has expired, and as to the construction of the Revenue Act of 1936 and Regulations 96 concerning the necessity for submission of evidence to the Commissioner are involved in a great many of said cases.

The question as to the jurisdiction of the District Court over the action is also important and substantial.

Statement of Case.

This has already been stated in the preceding petition in "Summary Statement of Matter Involved" (pp. 1-3), which is hereby adopted and made a part of this brief.

Specification of Errors.

The Circuit Court erred in holding that:

1. The action was barred by Section 904 of the Revenue Act of 1936; refund is barred by Section 3774 of the Internal Revenue Code.

2. Plaintiff's claim for refund did not comply with Sections 902 and 903 of the Revenue Act of 1936, as amended, and Regulations 96; the District Court did not have jurisdiction of the action.

ARGUMENT.

Summary of Argument.

Certiorari should be granted for the reasons that:

POINT I.

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE FIRST CIRCUIT, COURT OF CLAIMS, AND DISTRICT COURTS IN OTHER CIRCUITS ON THE QUESTION AS TO WHETHER A CLAIM FOR REFUND, FILED AFTER A FIRST CLAIM FOR REFUND HAS BEEN WHOLLY REJECTED BY THE COMMISSIONER OF INTERNAL REVENUE, WITHOUT CONSIDERATION OF THE MERITS THEREOF, BUT BEFORE THE STATUTORY PERIOD FOR FILING CLAIMS HAS EXPIRED, IS A NEW CLAIM OR A DUPLICATE OF THE FIRST CLAIM.

POINT II.

THE CIRCUIT COURT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THE THIRD CIRCUIT AND DISTRICT COURTS IN OTHER CIRCUITS ON THE QUESTION AS TO WHETHER SECTIONS 902 AND 903 OF THE REVENUE ACT OF 1936 AND REGULATIONS 96 REQUIRE THE SUBMISSION OF EVIDENCE TO THE COMMISSIONER OF INTERNAL REVENUE IN SUPPORT OF A CLAIM FOR REFUND OF TAXES PAID UNDER THE AGRICULTURAL ADJUSTMENT ACT OF 1933.

(a) The Circuit Court's decision is in direct conflict with the decisions of the Fifth and Sixth Circuits involving similar statutes and regulations, on the question as to whether the submission of evidence to the Commissioner of Internal Revenue is required in support of a claim for refund.

POINT III.

AN IMPORTANT AND SUBSTANTIAL QUESTION OF FEDERAL LAW IS INVOLVED WHICH HAS NOT BEEN AND SHOULD BE SETTLED BY THE SUPREME COURT.

POINT I.

The Circuit Court's decision is in direct conflict with the decisions of the First Circuit, Court of Claims, and District Courts in other circuits on the question as to whether a claim for refund, filed after a first claim for refund has been wholly rejected by the Commissioner of Internal Revenue, without consideration of the merits thereof but before the statutory period for filing claims has expired, is a new claim or a duplicate of the first claim.

The Circuit Court below held that the claim for refund involved in the action was not a new claim but was a duplicate of the original claim for refund previously filed by petitioner, that the action was commenced more than two years after the mailing of notice of disallowance of the original claim for refund, and is therefore barred by Section 904 of the Revenue Act of 1936.

Said decision is in direct conflict with the decision of the Circuit Court for the First Circuit in *Pacific Mills* v. *Nichols*, 72 F. (2d) 103 (C. C. A. 1st, 1934). The facts of said case are similar to those in the instant case. The original claim for refund was rejected by the Commissioner of Internal Revenue, without consideration thereof on its merits, and a second claim for refund revised by the addition of supporting data was filed within the statutory period for filing claims and before the statutory period for commencement of an action on the first claim had expired. The Court held in the cited case:

"* * * the Commissioner in fact never determined any questions raised by the first claim except one for special assessment. This appears from the correspondence. He said, as above quoted, '*Before consideration can be* given to your requests,' etc. This statement occurs in the letter accompanying the schedule showing what changes the Commissioner proposed to make in the plaintiff's income. *Clearly those changes are not, as the Government argues, and the District Judge in effect ruled, a decision on the claims* * * *. It was therefore still open to the plaintiff to file a new claim covering the items not passed upon; the time for filing claims not having expired.*

"In the present case, even if the Commissioner should be held to have decided every claim under the taxpayer's original petition, on March 26, 1927, when the second claim was filed, two years had not elapsed since the rejection of the first claim; *it was still open to the plaintiff to sue on the denial of the first claim* * * * *here the period of limitation had not run, at the time the second claim was filed.*" (Italics ours.)

The court in the latter case cited *Legal Opinion 1116 of the Solicitor of Internal Revenue*, C. B. III 350 (1924). Said Legal Opinion said in part:

"Where an original claim for refund of a tax is made * * * which claim is rejected *in toto* * * * claimant may make a new claim in the manner and form prescribed by the regulations, if the statutory period had not expired." (Headnote.)

In *First Nat. Pictures* v. *U. S.*, 32 Fed. Supp. 138 (Court of Claims 1940) the court held, as to a factual situation similar to that in the within case:

"We have therefore a case in which an insufficient claim was rejected on the ground above stated and suit not brought thereon within the limitations of bringing suit after a rejection. This fact, in our opinion, does not prevent the filing of a different claim which is sufficient, within the period in which such claims may be filed and bringing a suit within the statutory period after its rejection—all of which, in our opinion, the plaintiff has done.

" * * sole ground for rejection is that it was in substance and effect the same as the first claim. With this contention we do not agree.*

"We do not think the two claims can be regarded as one and the same, although they ask for the same amount of refund. They were based on altogether different theories and were supported by different facts. In other words, the grounds of the two claims were quite different. *The first claim was insufficient because, * * * it did not conform to the statute or the regulations, while there is no contention that the second claim is not valid in form."* (Italics ours.)

To the same effect see *Detroit Trust Co.* v. *U. S.*, 18 Fed. Supp. 776 (Court of Claims, 1937); *Sun-Herald Corporation* v. *Duggan*, 15 Fed. Supp. 415 (S. D., N. Y., 1936); *Dinon* v. *U. S.*, 37-1 U. S. T. C. 9149 (E. D., Pa., 1936); *Stephenson* v. *Woodworth*, 39-1 U. S. T. C. 9469 (E. D., Mich., 1939); *Williams, et al.* v. *U. S.*, 48 Fed. Supp. 647 (Court of Claims, 1943, cert. den. Oct. 11, 1943).

The authorities cited support petitioner's contention in the court below that the claim for refund involved in the action was a new claim, that it was within petitioner's power to abandon the original claim for refund which had been wholly rejected by the Commissioner of Internal Revenue without consideration of its merits, and file

a new claim within the statutory period for filing claims. The suit having been brought within two years of the mailing of the notice of disallowance "of that part of the claim to which such suit * * * relates" was timely commenced under Section 904 of the Revenue Act of 1936. (See Appendix.)

POINT II.

The Circuit Court's decision is in direct conflict with the decisions of the Third Circuit and District Courts in other circuits on the question as to whether Sections 902 and 903 of the Revenue Act of 1936 and Regulations 96 require the submission of evidence to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933.

In *Bethlehem Baking Co.* v. *U. S.*, 129 F. (2d) 490 (C. C. A. 3rd, 1942), the Circuit Court thus stated the question in the case:

> "The principal question in this case is whether the matter submitted by the plaintiff taxpayer to the Commissioner of Internal Revenue in support of a claim for refund of taxes paid under the Agricultural Adjustment Act of 1933 complied sufficiently with the requirements of Title VII, Section 902 of the Revenue Act of 1936, c. 690, 49 Stat. 1648 (providing for refund of such taxes), so as to preserve the plaintiff's standing to sue for the refund following the Commissioner's disallowance of the claim. * * * "

The Court in the cited case ruled that all evidence relied upon by the taxpayer did not have to be submitted to the Commissioner. It held:

> "In Section 903 of the Revenue Act of 1936 there is the additional provision that 'All evidence relied upon in support of such claim shall be clearly set forth under oath'. * * * *Was the requirement in Section 903 intended to impart finality to the decisions of the Commissioner* with respect to claims for refund by * * * *withdrawing jurisdiction from the courts in such regard because the Commissioner was not satisfied that all evidence relied upon in support of the claim had been clearly set forth under oath?* We think not. Section 903 appears to be in furtherance of the administration of Section 902. It indicates no legislative intent to give greater finality to the decisions of the administrative officer then did Section 902. * * * (Italics ours.)

The Court in the latter case cited *Hutzler Bros.* v. *U. S.*, 33 Fed. Supp. 801 (D. C., Md., 1940). In the said case, the Government's contention was similar to that made in the instant case. It is thus stated by the Court:

> "It is contended that by this provision the plaintiff was required to set forth under oath all of the evidence upon which it relied as a condition precedent to the allowance of any claim for refund, and that no suit may be maintained in this Court by plaintiff unless it alleges,—as it did not do,—as an essential part of its right of action, that it had presented to the Commissioner all the available evidence bearing upon its right to refund. * * * "

The Court held as to said contention:

> " * * * We find this position of the Government to be without merit. Where a claim has been rejected by the Commissioner and such a fact is

alleged in the complaint, no further allegation is necessary for the maintenance of a suit for refund; and in such a suit a plaintiff is not limited to the same evidence produced before the Commissioner. *The intent of the statute, reasonably interpreted from the language employed and above quoted, is to bar consideration of claims merely on informal statements or memoranda,* and to surround the presentation of claims with full verification, but it is not intended that a claimant who produces before the Commissioner certain evidence is forever thereafter barred from introducing further evidence in resorting to a Court proceeding for refund,—a right which is expressly given by Section 905 of the Act." (Italics ours.)

To the same effect as the two cited cases, see:

Bullock's Inc. v. *U. S.*, 43 Fed. Supp. 861 (S. D., Calif., 1941);

Ney, et al. v. *U. S.*, 33 Fed. Supp. 554 (W. D., Va., 1940);

Joe Hanna v. *U. S.*, 27 AFTR 1135 (W. D., Texas, 1940);

Bricker Baking Co. v. *Rothensies, et al.*, 46 Fed. Supp. 742 (E. D., Pa., 1942).

The Circuit Court in the instant case held that "both claims filed by appellant were wholely inadequate and insufficient * * * " (R. p. 51). Said decision, it is submitted, is in direct conflict with the decisions above set forth.

(a) The Circuit Court's decision is in direct conflict with the decisions of the Fifth and Sixth Circuits involving similar statutes and regulations on the question as to whether submission of evidence to the Commissioner

of Internal Revenue is required in support of a claim for refund.

Petitioner's authority for reference to other statutes and regulations concerning other claims for refund is found in the *Congressional Committee Report on the Revenue Act of 1936* (C. B. 1939-1, Part 2). The purpose of said statute is thus stated (pp. 699-700):

> "The revision of the provisions of section 21 (d) contained in Title VII adheres to the fundamental principle of equity applicable in respect to claims for refund, namely, that the claimant secure a refund only with respect to the amount of tax of which he bore the economic burden. However, the procedure in the handling of these claims has been modified so as to diminish in so far as possible the administrative burden involved in passing on them. The greater number of claims which may be filed relate to claims for compensating taxes and floor stock taxes. In these cases the issue of fact as to whether or not the claimant bore the economic burden of the tax will be relatively simple. *The bill therefore proposes that such claims shall be handled in the same manner as any other claims for refund* under existing law. The claimant will merely present his claim to the Bureau of Internal Revenue, and it will be passed on without formal hearing. If the claimant is dissatisfied with the decision of the Commissioner, he will then have recourse to the district court or the Court of Claims." (Italics ours.)

The manner in which "any other claims for refund under existing law" was handled is illustrated in the following cases; petitioner's interpretation of Section 903 of the Revenue Act of 1936 here involved, is supported

by these cases which place a similar interpretation on similar statutes concerning "other claims for refund".

In *Paul Jones & Co.* v. *Lucas*, 33 F. (2d) 907 (D. C., Ky., 1929), affirmed 64 F. (2d) 1016, the Revenue Act of 1926 (Sec. 1113-a) and Regulations 69 (Art. 1304) were involved. The Court held:

> "The provision contained in Article 1304 of Treasury Regulations 69, *supra*, to the effect that 'all facts relied upon in support of the claim should be clearly set forth in detail under oath' is a proper exercise of the power delegated to the Commissioner of Internal Revenue to make rules and regulations for the enforcement of the act in question. * * * "
>
> "Fairly construed, the language of the regulations just quoted *does not require all the evidence upon which a taxpayer relies to be presented to the Commissioner.* It simply requires the fact or reasons for the alleged illegality of the tax to be presented to the Commissioner, leaving the taxpayer entirely free, if he fails to secure relief at the hands of the Commissioner, to adduce, in a suit in court, new and additional evidence in support of the fact or reasons relied upon to establish the illegality of the tax." (Italics ours.)

In *Snead, Collector* v. *F. H. Elmore*, 59 F. (2d) 312 (C. C. A. 5th, 1932), the statutes and regulations involved were 26 U. S. C. A. 156 and Regulations 45, Article 1036. The Court stated:

> "The regulations then in force, No. 45, Art. 1036, require that 'all the facts relied upon in support of the claim shall be clearly set forth under oath' * * *. *This does not mean that the claim for refund must have contained all the evidence or argu-*

> *ment* that is offered in the suit, but it must have indicated not only the amount claimed but the substantial grounds on which illegality is asserted and the general facts supporting the grounds. * * * "

In *Fidelity & Columbia Trust Co.* v. *Lucas*, 7 F. (2d) 146 (D. C., Ky., 1925), the Court stated as follows:

> " * * * in suits to recover internal revenue taxes erroneously or illegally assessed and collected, * * * Congress has not committed the final decision in these matters to the Commissioner of Internal Revenue, or to any other executive or ministerial officer. On the contrary, *jurisdiction to finally determine such matters is conferred upon the Judicial Dept.*, provided the taxpayer has first taken all the steps required by law to be taken before appealing to the court. * * *
>
> "In view of these statutory provisions (Section 3226 of the Revised Statutes, among others) and the authorities referred to, *this court is satisfied that it has jurisdiction to try the question of the plaintiff's tax liability in this case de novo, without in any way being limited to the evidence heard by the Commissioner, and unprejudiced by any action he may have taken in the matter.* * * * " (Italics ours.)

Section 903 of the Revenue Act of 1936 and Articles 201 and 202 of Regulations 96 (see Appendix) involved in the instant case are similar in their requirements to the statute and regulations involved in *Paul Jones & Co.* v. *Lucas*, and *Snead, Collector* v. *F. H. Elmore, supra.* The Circuit Court herein found in the case of *New York Handkerchief Mfg. Co.* v. *The United States of America*, 44 U. S. T. C. 9295, decided April 25, 1944, as contended

by plaintiff-appellant there, that the regulations involved in the two cited cases "do not require that the evidence on which the claimant relied be presented to the Commissioner".

It is submitted that the said finding is inconsistent with the Court's decision herein (R. p. 53) based on *New York Handkerchief Mfg. Co.* v. *The United States of America, supra,* that the claim for refund was insufficient because of the failure to submit evidence to the Commissioner, in view of the similarity in statutory requirements; that said decision defeats the purpose of said statute as stated in the Congressional Committee Report, *supra,* that claims for refund "shall be handled in the same manner as any other claims for refund under existing law", and that said decision is in direct conflict with the decisions in the two cited cases.

POINT III.

An important and substantial question of Federal Law is involved which has not been and should be settled by the Supreme Court.

Respondent had moved to dismiss the complaint on the ground, in part, that the District Court "is without jurisdiction to hear and determine upon the merits of the matters alleged in the complaint * * *" (R. p. 4) for the reason that no evidence had been submitted to the Commissioner of Internal Revenue. The Circuit Court, without ruling specifically on the question of jurisdiction, has ruled, in effect, by its affirmance of the dismissal of the complaint, that the District Court has no jurisdiction of the action.

Whether the submission of evidence to the Commissioner of Internal Revenue is a condition precedent to the District Court's jurisdiction of the action so that

failure to submit such evidence would oust the court of jurisdiction is a substantial question of federal law and of the utmost important and should be settled by the Supreme Court.

The position of the court below that evidence must accompany a Title VII floor stocks refund claim in order to provide jurisdiction in the District Court is untenable. For example, in the instant case, four employees submitted affidavits under oath (in the second claim) attesting that sales prices were not increased after August 1, 1933, and that the petitioner absorbed the tax burden. It is clear that if these affidavits had been submitted as the sole support of an independent claim under normal circumstances (the claim for refund having been rejected and a suit having been timely filed) the Federal District Court would be considered as having jurisdiction; yet, it is also clear that these affidavits and all similar material are not truly "evidence" as the word evidence is understood in a court of law.

All of said employees being alive, available and able to testify, their affidavits would be *inadmissible in evidence*. Thus we are brought to the incongruous result that in practically no case can the "evidence" be submitted to the Commissioner because evidence in the legal sense is presented in a court room ordinarily through a living witness. As a result, it seems plain that what Congress had in mind was the submission of a summary of the *essential facts* upon which a claimant relied, when it used the statutory language in Section 903, as follows: "All evidence relied upon in support of such claim shall be clearly set forth under oath." (See Appendix.)

The untenable position of the court below is again demonstrated by two obvious examples. In almost all of these Agricultural Adjustment Act refund claims, the significant records consist of the purchase invoices, the du-

plicate sales invoices, general ledgers, operating and income data and similar material. Under the Federal law relating to admissibility of business records, these purchase and duplicate sales invoices normally would be submitted in evidence through a competent witness. Yet it would stultify the operations of almost all businesses if all of these records had to be sent to the Commissioner, since these records are constantly required in the ordinary course of business. Had the statute intended to deprive American taxpayers of their general ledgers and other vital records by an alleged requirement that the same must be submitted with any large or small refund claim, its language would have so provided, unequivocally and expressly, because such a requirement would be a radical innovation in American tax law. (As a matter of fact, the submission of all such data to the Commissioner would embarrass the Treasury Department and create a warehousing problem of quite some magnitude.)

It should also be borne in mind that records once submitted to the Treasury Department generally are not returned and therefore these records would be irrevocably lost to taxpayers. The absence of such records would delay, hinder or defeat the claims of others in controversies or problems wholly unrelated to Agricultural Adjustment Act matters. Nor is it simple to suggest that these records be photostated or copied, since even a small business would have thousands of these purchase invoices, duplicate sales invoices, inventory sheets, etc. It would be an intolerable burden upon the normal taxpayer to compel him to spend hundreds or thousands of dollars to reproduce and submit these records, when it has been a long standing practice in Federal tax work for the Commissioner to send agents to examine such records at the place of business of the taxpayer. In actual practice, in cases such as the instant one, the Commissioner has sent

out field agents and examiners to the places of business of most claimants, which in itself shows that the theoretical or actual administrative inconvenience to the Commissioner alleged to exist if claimants do not submit all the "evidence" or facts is infinitesimal.

In almost every Title VII floor stocks tax case brought to the Federal courts the Commissioner has raised this same special defense that the court is without jurisdiction because the claimant failed to submit all the evidence. One need only examine some of the consequences to see how pernicious is this new doctrine in Federal tax practice; most important, it requires *two* trials in the Federal District Court instead of *one*. If the Commissioner's view is to prevail, then in every tax case of this type a motion to dismiss for lack of jurisdiction will inevitably be converted into a pre-trial or separate trial, at which the District Court Judge will have to hear and review all the evidence in order to determine whether enough evidence has been submitted to *establish jurisdiction*. If a claimant successfully runs this gauntlet, then at a later time a second trial on the merits will be held before the same District Court to determine the outcome of the case. The above result is so plainly unjust and a departure from the recently liberalized Federal rules of practice that the Supreme Court should not indirectly stamp its approval thereof through a denial of certiorari.

Further, there are many hundreds of cases such as the instant one still pending in the Federal Courts. Recovery will be denied claimant in some circuits for the same reason that recovery was here denied, whereas other claimants in similar factual situations, but in different circuits, will recover. If certiorari is here granted and the ultimate guiding rule in this type of case is announced by the Supreme Court, there will be uniformity of decision in the several circuits; thus, there will be no

advantage afforded to some claimants solely by reason of their geographical location; further, many claimants will then be in a position to determine whether to proceed with or discontinue their actions, with a resultant saving of time and expense for the courts, counsel and litigants.

It is therefore respectfully submitted that this case is one calling for an exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

DAVID J. SHORB,
Counsel for Petitioner.

KENNETH CARROAD,
B. R. DREYER,
Of Counsel.

APPENDIX.

Section 904 of the Revenue Act of 1936.

STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after June 22, 1936, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under this chapter * * * (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

Section 3774 of the Internal Revenue Code.

REFUNDS AFTER PERIODS OF LIMITATION.

A refund of any portion of an internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) shall be considered erroneous——

(a) Expiration of period for filing claim. If made after the expiration of the period of limitation for filing claim therefor, unless within such period claim was filed; or

(b) Disallowance of claim and expiration of period for filing suit. In the case of a claim filed within the

proper time and disallowed by the Commissioner if the refund was made after the expiration of the period of limitation for filing suit, unless——

(1) within such period suit was begun by the taxpayer, or

(2) within such period, the taxpayer and the Commissioner agreed in writing to suspend the running of the statute of limitations for filing suit from the date of the agreement to the date of final decision in one or more named cases then pending before the Board of Tax Appeals or the courts. If such agreement has been entered into, the running of such statute of limitations shall be suspended in accordance with the terms of the agreement.

(c) Cross reference.

Section 902 of the Revenue Act of 1936.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the Trial Court, or the Board of Review in cases provided for under Section 906, as the case may be:

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control or having control

over him or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

Section 903 of the Revenue Act of 1936, as Amended.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940,[1] a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from

1. "January 1, 1940" substituted for "July 1, 1937" by Revenue Act of 1939.

such person as tax under the Agricultural Adjustment Act; and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

Articles 201 and 202 of Regulations 96.

Article 201. Claims—Form and where to file.—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. * * *

Article 202. Facts and evidence in support of claim.—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.

The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 268

THE 18TH STREET LEADER STORES, INC., PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals (R. 51–55) is reported in 142 F. 2d 113.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 3, 1944 (R. 56). The petition for a writ of certiorari was filed on July 18, 1944. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a claim for refund has been rejected by the Commissioner of Internal Revenue, can the

taxpayer, by thereafter filing a new claim for the same amount and upon the identical grounds asserted in the first claim, thereby enlarge its time for filing suit under Section 904 of the Revenue Act of 1936 beyond the expiration of two years from notice of disallowance of the first claim?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set forth in the Appendix, *infra*, pp. 10–14.

STATEMENT

On or about September 30, 1933, the taxpayer paid cotton floor stocks taxes in the amount of $2,218.32 which had been erroneously assessed under the unconstitutional Agricultural Adjustment Act (R. 2–3). On December 9, 1936, the taxpayer filed a timely claim for refund for these taxes on P. T. Treasury Department Form 76 (R. 4, 7–13). Schedule D of the claim form, where the claimant was required to list evidence submitted with the claim, contained only the following statement (R. 11):

> The burden of the Floor tax was borne by the claimant and not shifted to others in the amount, as set forth on the previous schedules, of $2,218.32.
>
> The following evidence is submitted:
>
> For the fiscal year ended January 31, 1934 gross profits on sales were 30.42%; whereas, for the fiscal year ended January 31, 1935 the gross profits were 30.33%.

> **Further, it is our contention that we did not increase the selling price of the merchandise on those items wherein the floor stocks tax was paid.**

On September 1, 1937, the Deputy Commissioner of Internal Revenue wrote the taxpayer that the statements set out in Schedule D were insufficient to substantiate the contention that the burden of tax had been borne by the taxpayer and not shifted to others, and that evidence in support of the claim would have to be submitted under oath, including a list of articles appearing in Inventories, Records and Returns, P. T. Form 42, showing opposite each item in three separate columns, (1) the prices at which the articles were held for sale on August 1, 1933, (2) the prices at which similar articles were sold prior to that date, and (3) the prices at which the inventoried articles were actually sold. The taxpayer was also required to submit an explanation of the circumstances attending any change in the prices of the inventoried articles and showing the quantities of each article sold prior to each such change. (R. 15–17.) The Deputy Commissioner further wrote the taxpayer on November 3, 1937 (R. 17–18), November 23, 1937 (R. 18–19), December 30, 1937 (R. 20), and February 28, 1938 (R. 21–22), calling attention to the failure to submit evidence in support of the claim and in each case granting extensions of time for the submission of evidence requested.

On May 17, 1938, the Commissioner wrote the taxpayer that since no additional evidence had been submitted, as required by Sections 902 and 903, Title VII, Revenue Act of 1936, and the provisions of Regulations 96, which was sufficient to establish that the taxpayer had borne the burden of the tax, the Commissioner was without authority to consider the claim favorably and that it was therefore rejected in full (R. 23–24).

Thereafter, on December 28, 1939, the taxpayer filed a new claim for refund for the same taxes on the same P. T. Form 76 setting out the same grounds relied upon in the first claim (R. 25–35). Schedule D merely referred to attached affidavits (R. 29). The attached affidavit of Edward Oplatka stated, generally, that the taxpayer had borne the tax burden and that it had not been shifted to others; that books were maintained reflecting true operations of the business but the taxpayer did not keep voluminous records and that other businesses keeping no more detailed records had been successful in securing refunds of processing taxes under the Revenue Act of 1936 (R. 32). The attached affidavits of three employees each stated that affiant knew of his own knowledge "in connection with the payment under Section 602 of the Revenue Act of 1936" that the sales prices to the customers of taxpayer of merchandise of cotton content were not increased subsequent to August 1, 1933, and "that therefore to the best of his knowledge and belief, processing tax was borne

by The Leader Store, in its entirety and was not shifted or passed on to the vendee" (R. 33–35).

On June 21, 1940, the Commissioner addressed a letter to the taxpayer rejecting the second claim for refund. The letter referred to the rejection of the first claim and stated that Regulation 96, Article 302, provided that only one claim for refund shall be filed by any person for the refund of floor stocks taxes. Since the second claim was a duplication of the prior claim it was therefore rejected in full. The letter further stated that the statute of limitations for bringing suit on claims of this character, as prescribed by Section 904, Revenue Act of 1936, of two years from date of mailing notice of disallowance to claimant had expired, and that any refund was barred. (R. 35–36.)

The complaint to recover the taxes was filed on June 20, 1942 (R. 2). The District Court sustained a motion to dismiss the complaint (R. 37–38). On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment of the District Court was affirmed (R. 56).

ARGUMENT

The case was correctly decided by the court below, and there is no conflict of decisions.

Section 903, Revenue Act of 1936 (Appendix, *infra,* p. 11), authorizes the Commissioner, with the approval of the Secretary of the Treasury, to prescribe by regulations the number of claims which may be filed by any person for taxes collected under the Agricultural Adjustment Act.

Treasury Regulations 96, Article 302 (Appendix, *infra,* p. 14), which deals with claims for refund under the Agricultural Adjustment Act, specifically provides that only one claim shall be filed by any person for refund of floor stocks taxes.

In cases involving other kinds of federal taxes, even in the absence of specific regulations dealing with this question, it is established that after a claim for refund has been rejected, the statutory period for bringing suit to recover the taxes cannot be enlarged by filing a new claim for refund on identical grounds. In such case, the time for instituting the suit runs from the date of rejection of the first claim. *Einson-Freeman Co.* v. *Corwin,* 112 F. 2d 683 (C. C. A. 2d), certiorari denied, 311 U. S. 693; *B. Altman & Co.* v. *United States,* 40 F. 2d 781 (C. Cls.), certiorari denied, 282 U. S. 863; *Ragan-Malone Co.* v. *United States,* 38 F. Supp. 290 (C. Cls.).

The cases relied upon by taxpayer are not in conflict. In *Pacific Mills* v. *Nichols,* 72 F. 2d 103 (C. C. A. 1st), one of the grounds in the claim for refund was that the cost of goods sold was greater than the amount stated in the return, and that the market price of cotton and wool fixed by the Bureau of Internal Revenue was greater than the actual market price. That claim was rejected and a second claim was filed, based on the contention that the taxpayer's closing inventory for wool for the year 1918 should be valued at British Isle prices rather than at prices fixed by the Bureau of

Internal Revenue. The court took the view that the second claim raised different grounds and so was not a repetition of the first claim.[1] But even if it be assumed, as the taxpayer contends, that the claims involved in the *Pacific Mills* case were identical, that decision is not in conflict with the ruling here because the real basis of that decision was that the Commissioner, by considering the second claim, reopened the claim first filed and the statute began to run on the date of final rejection. *Pacific Mills* v. *Nichols, supra* (p. 107). The consideration and rejection of the second claim in this case should not effect a reopening of the original claim, since Section 904, Revenue Act of 1936, here applicable, specifically provides:

> Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

Similarly, in *First Nat. Pictures* v. *United States,* 32 F. Supp. 138 (C. Cls.), and *Sun-Herald Corp.* v. *Duggan,* 15 F. Supp. 415 (S. D. N. Y.), the second claims were based on wholly different grounds from the first claims. In *Detroit Trust Co.* v. *United States,* 18 F. Supp. 776 (C. Cls.),

[1] The taxpayer relied on the *Pacific Mills* case in the *Einson-Freeman Co.* case, *supra.* The court distinguished the case on the grounds above mentioned. See respondent's brief in opposition, *Einson-Freeman Co.* v. *Corwin,* No. 432, October Term, 1940.

the second claim was filed by residuary legatees, whereas the first claim was filed by an administrator.

In *Williams* v. *United States*, 48 F. Supp. 647 (C. Cls.), the Government objected to the timeliness of the first claim because schedules in support of the claim had been filed after the statutory period expired. A second claim covering the identical subject matter was filed as a precautionary step after Congress by Section 405, Revenue Act of 1939, had extended the time for filing claims. Separate suits were filed on both claims and the cases consolidated for trial. The court held that the additional facts supporting the first claim were filed within the time as specified by the Commissioner in a letter written to taxpayer and were properly presented within the Treasury Regulations dealing with the subject.

In *Dinon* v. *United States* (E. D. Pa.), decided February 5, 1937 (1937 C. C. H., par. 9149), and *Stephenson* v. *Woodworth* (E. D. Mich.), decided February 14, 1939 (1939 C. C. H., par. 9469), the Commissioner reopened claims for refund after their disallowance. The cases do not involve the filing of second claims.

L. O. 1116, III–1 Cum. Bull. 350 (1924), relied upon in the petition for certiorari (p. 4), deals only with the reopening of claims on new grounds and the filing of new claims within the statutory period, and hence is inapplicable here.

The court below held that inasmuch as the second claim was rejected because it was a duplicate of the first claim, the question presented by

the appeal was whether the suit was timely filed rather than the adequacy of the claims. The court stated, however, that it was clear under several cases cited that both claims filed by taxpayer were insufficient basis for the allowance of refunds. Even assuming that the court's decision is based upon a holding that both claims were inadequate, its ruling is not in conflict with any of the decisions cited by taxpayer in the petition for certiorari (pp. 4–6). None of these decisions holds that a claimant for a refund of floor stocks taxes is not required to submit any evidence to the Commissioner in support of its claim. A more extensive discussion of this point is contained in the brief for the United States in opposition in No. 247, *New York Handkerchief Mfg. Co.* v. *United States.*

CONCLUSION

The decision below is correct and there is no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
A. F. PRESCOTT,
HOMER R. MILLER,
Special Assistants to the Attorney General.

AUGUST 1944.

APPENDIX

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be

reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever. (7 U. S. C. 1940 ed., Sec. 644.)

SEC. 903. [As amended by Sec. 405, Revenue Act of 1939.] FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to January 1, 1940, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes. (7 U. S. C. 1940 ed., Sec. 645.)

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of

this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought. (7 U. S. C. 1940 ed., Sec. 646.)

* * * * *

SEC. 916. RULES AND REGULATIONS.

The Commissioner shall, with the approval of the Secretary, prescribe such rules and regulations as may be deemed necessary to carry out the provisions of this title. (7 U. S. C. 1940 ed., Sec. 658.)

Revenue Act of 1939, c. 247, 53 Stat. 862:

SEC. 405. FILING OF CLAIMS FOR REFUND OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

Section 903 of the Revenue Act of 1936 (relating to expiration of time for filing claims for refund of amounts paid under the Agricultural Adjustment Act) is amended by striking out "July 1, 1937" and inserting in lieu thereof "January 1, 1940". (7 U. S. C. 1940 ed., Sec. 645.)

Treasury Regulations 96, relating to claims for refund under the Revenue Act of 1936:

> ART. 201. *Claims—Form and where to file.*—Claims for the refund of tax shall be made on the prescribed forms. Such claims shall be prepared in accordance with the instructions contained on the forms and in accordance with the provisions of these regulations. Each claim (except claims for refund of compensating tax—see article 401) shall be filed with the collector of internal revenue for the district wherein the claimant has his principal place of business. If the claimant has no principal place of business in the United States, the claim shall be filed with the collector of internal revenue located at Baltimore, Md. Copies of the prescribed forms may be obtained from any collector of internal revenue.
>
> ART. 202. *Facts and evidence in support of claim.*—Each claim shall set forth in detail and under oath each ground upon which the refund is claimed. It is incumbent upon the claimant to prepare a true and complete claim and to substantiate by clear and convincing evidence all of the facts necessary to establish his claim to the satisfaction of the Commissioner; failure to do so will result in the disallowance of the claim.
>
> The provisions of these regulations require that certain specific facts shall be stated in support of any claim for refund. The claimant is privileged to prove those facts in any manner available to him and to submit such evidence to that end as he may desire.
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ART. 301. *Claim form prescribed.*—Claims for refund of amounts paid as floor stocks tax shall be filed on P. T. Form 76. (See Chapter II for general provisions relating to all claims.)

ART. 302. *Limitation as to number of claims.*—Only one claim shall be filed by any person for refund of floor stocks taxes. The claimant shall include in such claim the total amount of refund claimed with respect to the total amount of all floor stocks taxes paid by him.

If the claimant paid floor stocks tax with respect to more than one commodity, the total amount of refund claimed out of the total floor stocks taxes paid with respect to all commodities shall, nevertheless, be set forth in one claim. For example, if the claimant paid the cotton floor stocks tax, the wheat floor stocks tax, and the tobacco floor stocks tax, he shall include in one claim the total amount of the refund sought out of the total amount of floor stocks taxes paid by him with respect to cotton articles, wheat articles, and tobacco articles, and shall not file three separate claims.

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